IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2499 of 2000

For Approval and Signature: sd/-

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANTABEN T SHAH

Versus

DEVENDRAKUMAR C SHAH

Appearance:

1. First Appeal No. 2499 of 2000

MR SUDHANSHU S PATEL for Petitioners No. 1-7

MR GR SHAIKH for Respondent No. 1

MR SURESH M SHAH for Respondents No. 1,2

MR MEHUL S SHAH for Respondents No. 1-2

NOTICE SERVED BY DS for Respondent No. 3

RULE SERVED BY DS for Respondents No. 3/1-4

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 01/11/2001

ORAL JUDGEMENT

1. The respondent No.1 - original defendant No.1 Devendrakumar C. Shah is Organizer of Rama Apartments. He staying in Flat No.9 of the said Apartments. The defendant No.2 Ashish Devendrakumar Shah, son of defendant No.1 is the builder carrying out construction work in the name and style of "Pintu Builders & Organizer". He staying with his father i.e. defendant No.1 in Rama Apartments. The said apartments were constructed by the defendant No.2. In all 12 flats have been constructed and (1) Shri Vimalkant J. Bhojak, (2) Shri Ramanlal Hiralal Thakkar, (3) Smt. Prabhaben Champaklal Soni, (4) Smt. Yashodaraben Vasudev Thakkar, (5) Jayshreeben Kantilal Pathak, (6) Urmilaben Manilal Patel, (7) Kantaben Thakarshibhai Shah, (8) Dr. Bhanvarlal Mangilal Jain and (9) Shri Bhavsar, respectively the plaintiffs No.1 to 9 have purchased the said flats from defendant No.1 and since 1990-91 the plaintiffs are staying in their respective flats. As per the document each member has got 1/12 share in the said apartments and as per the terms and condition no one can construct on terrace of the said apartments. There is a clear reference to that effect in the registered document. Each flat is having construction of 80 sq.yds. 4 flats are on the ground floor, 4 flats are on the first floor and 4 flats are on the 2nd floor. In all 12 flats are there in Rama Apartments. Out of 12 flats, 9 flats are in possession of the plaintiffs, one flat is in possession of defendants No.1 & 2 and Flat No.2 & 12 are vacant as the owner of the said flats are not residing in Ahmedabad.

2. It is alleged that by keeping the plaintiffs in dark the defendants No.1 & 2 wanted to construct 2 more flats on the terrace of the 2nd floor of the apartments and they wanted to finish illegal construction at the earliest. When the plaintiffs tried to stop the illegal construction they were threaten by the defendants No.1 & 2. Without getting the plan approved the defendants No.1 & 2 wanted to complete the construction for which the defendant No.3 had not given any permission. Therefore, at last the plaintiffs have to file Civil Suit No.2689 of 1994 before the City Civil Court, Ahmedabad. Along with the said Suit, the plaintiffs have also filed injuction Application and prayed that the defendants No.1 & 2 be restrained from putting up any construction or completing the construction on the terrace and they may be restrained from selling part of the terrace to anyone else.

3. It appears that on injunction Application the

City Civil Court granted injunction in favour of the plaintiffs in the Suit filed by them and restrained the defendants from putting up any construction. The said injunction was continued in favour of the plaintiffs till 7.8.2000. However, on 7.8.2000 written undertaking Ex.31 submitted in Civil suit No.2689 of 1994 by the defendants No.1 & 2 Shri Devendra Shah and Shri Ashish Shah to the effect that they will not put up any construction on the terrace of 3rd floor, which they are constructing on the terrace (2nd floor) of the apartments, and all the common rights of the plaintiffs regarding use of terrace shall continue. They will also abide by the understanding arrived at between the parties outside the Court. Accordingly, it was prayed that interim stay against the construction granted by the Court be vacated. Simultaneously, Purshis Ex.33 was submitted on the same day i.e. on 7.8.2000 stating that "stay against the construction on the terrace, granted in the suit filed by the plaintiffs, is in force till today, but the plaintiffs have no objection if the defendants put up construction as per the undertaking Ex.31 submitted to the Court on the terrace because of the F.S.I. got by them. The decree may be drawn to the effect that their right on the terrace after construction would remain intact and accordingly the stay may be vacated. The said purshis Ex.33 for consent decree was signed by one Shri Rajesh G. Bhojak, on behalf of Shri Vimalkant Bhojak, plaintiff No.1, and also signed by both the defendants Shri Ashish Shah and Shri Devendra Shah. It was signed by the learned Advocate Shri P.D.Bhate for the plaintiffs and Shri B.K.Dosani for the defendants.

4. Accordingly, in terms of the aforesaid purshis Ex.33, the learned Judge decreed the Suit on 16.8.2000 which is challenged in this Appeal by 7 Appellants plaintiffs, out of 9 original plaintiffs. However, 2 original plaintiffs were not interested in filing the Appeal because of the fact that they have sold their flats and therefore they have been joined as formal respondents in this Appeal.

5. Learned Counsel Shri Patel for the appellant original plaintiffs vehemently submitted that the learned trial Judge has committed an error in passing the impugned decree on the basis of Ex.31 and 33. He submitted that the undertaking Ex.31 was duly signed by the defendants, but it does not bear the signature of their Advocate. Surprisingly, their Advocate Shri Pradip Bhate for the plaintiffs signed below the endorsement dated 7.8.2000 made by one Shri Rajesh G. Bhojak, below Ex.31 stating that (" _____

_____") "hereby we plaintiff No.1 state that by reserving the rights of the plaintiffs for terrace if the defendants put up some construction then they have no objection". Ex.31 does not bear the signature of any of the plaintiffs. It only bears the signature of Advocate Shri Pradip Bhate. He submitted that earlier for compromising the suit it was not required to be signed by the parties under Order : 23, Rule : 3 C.P.C. but after amendment of 1976 the consent terms are required to be duly signed by the parties. Inspite of fact that there was no signature of any of the plaintiffs, either on the Undertaking Ex.31 or on the purshis Ex.33, learned Judge accepted such compromise and passed the consent decree which is nul and void and liable to be quashed and set aside. He submitted that Rajesh C. Bhojak, who had signed on behalf of the plaintiff No.1 Vimalkant J. Bhojak was some unknown person and he was not authorized by plaintiff to sign on their behalf or on behalf of the plaintiff No.1 and by getting his signature below Ex.31 and obtaining the signature of Advocate Shri Bhate for the plaintiffs, the defendant have played fraud with them as neither Shri Bhojak or Advocate Shri Pradip Bhate were authorized to sign the compromise on their behalf.

6. However, learned Counsel Shri S.M.Shah, appearing for the respondents No.1 & 2 - original defendants No.1 & 2 firstly submitted that if at all, according to the plaintiffs, fraud is played upon them then instead of challenging the impugned Decree by way of this First Appeal before this Court they should have first approached the trial Court by way of proper application. Therefore, this Court should not entertain this Appeal and relegate the appellant-plaintiff for that remedy of approaching the trial Court. In support of his submission Shri shah has relied upon the Judgment of the Hon'ble Supreme Court in the case of BANWARI LAL v/s. SMT CHANDO DEVI, reported in AIR 1993 SC 1139. Shri Shah also submitted that once the plaintiffs have engaged their Advocate before the trial Court to contest the Suit, then their Advocate would be competent to sign the consent terms on their behalf, and once their Advocate had signed the consent terms then later on they can not make grievance about it. In support of his submission Shri Shah has placed reliance upon the Judgment of the learned Single Judge of this Court in case of JITENDRAKUMAR CHUNILAL BOSMIYA v/s. STATE OF GUJARAT, reported in 1995 (1) GLH 838.

7. It is no doubt true that the appellants

plaintiffs could have approached the trial Court under the proviso to Rule : 3, Order : 23 C.P.C., but they can also challenge the decree in Appeal u/s.96(1) C.P.C. before this Court, but when this Court has already entertained the Appeal against the consent decree passed by the trial Court then merely because they have alternative remedy of approaching the trial Court by way of Application under the proviso to Rule : 3 of Order 23 would not be a ground for this Court not to entertain this Appeal on merits. Hence, the first objection raised by Shri Shah on behalf of the respondent - defendants No.1 & 2 has to be rejected.

8. The second submission raised by Shri Shah for the respondents - defendants No.1 & 2 that the Advocate Shri Pradip Bhate for the plaintiffs was fully justified in signing the consent purshis and the consent decree passed by the trial Court on the basis of such purshis is binding to the appellants - plaintiffs has no substance on the peculiar facts of this case. Hence, the reliance placed by Shri Shah upon the Judgment of this Court in case of Jitendrakumar (supra) will be of no use.

9. I shall straightway come to the facts of this case which are as under :

i) It is alleged in the plaint that original defendant No.1 is the Organizer of the scheme who sold the flats of 'Rama Apartments' to different persons. The defendant No.2 is the builder who constructed 'Rama Apartments'. Both of them are staying in flat No.9 of 'Rama Apartments'. Originally 9 plaintiffs purchased flats in "Rama Apartments' in 1990-1991 from the defendant No.1. There are in all 12 flats in the apartments. As per the documents it is clear that each member will have 1/12 share, in the use of the common terrace, the passage, parking, etc. It was clearly mentioned that no construction of any sort will be made on the terrace. The construction of each flat is of 80 sq.yds. 4 flats are constructed on each floor i.e. 4 on the ground floor, 4 on the first floor and 4 on the 2nd floor. Thus, in all 12 flats are there.

ii) Somewhere in 1994 the defendants No.1 & 2 wanted to illegally construct two more flats on the common terrace of the 2nd floor and wanted to finish the said construction at the earliest without getting the plan approved from the competent Authority. When they were persuaded

not to continue with the construction, they refused to give any heed to the plaintiffs therefore, they had to approach the Civil Court in 1994 and obtained the stay against the construction which was in operation for the last six years i.e. upto 7.8.2000.

iii) However, all of a sudden on 7.8.2000 signed Undertaking was submitted by the defendants No.1 & 2 before the trial Court not having signature of their Advocates to the effect that they will not put up any construction on the terrace of two flats which they are constructing on the terrace of the second floor of apartment and the common rights of the plaintiffs will not be affected. Out of the Court they have arrived at an understanding with the plaintiffs, and as per the understanding they have to act. On that undertaking Ex.31 endorsement was made by one Shri Rajesh G. Bhojak on 7.8.2000 that he will have no objection if without affecting the rights of the plaintiffs the defendant put up any construction.

It is unfortunate that the learned trial judge has not at all applied her mind that said Rajesh G. Bhojak was not the plaintiffs. However, it was tried to be submitted by Shri Shah for the respondents - defendants No.1 & 2 that he was related to the plaintiff No.1 Shri Vimalkant J. Bhojak. However, there is nothing on record to show that, even assuming for the sake of argument that he was related to plaintiff No.1 then also he would not be entitled to make such endorsement unless he was authorised to do so by Shri Vimalkant J. Bhojak, plaintiff No.1, on his behalf or by other plaintiffs. It is unfortunate that Advocate Shri Pradip Bhate for the plaintiffs had signed below such endorsement without ascertaining the fact regarding such so called compromise.

iv) It is also surprising that consent purshis Ex.33 was filed on the same day i.e. on 7.8.2000 which does not bear the signature of any other plaintiff except Shri Rajesh G. Bhojak for Shri Vimalkant J. Bhojak for plaintiff No.1. Even assuming for the sake of argument that said Shri Rajesh Bhojak was authorized by Shri Vimalkant Bhojak to sign consent purshis on his behalf, then also he could not have signed the said

consent purshis on behalf of the rest of the plaintiffs. This glaring aspect of the case was not at all considered by the learned trial Judge while passing the consent decree.

v) When there are four flats on each floor then the defendants No.1 & 2 can not construct two flats on the terrace of the 2nd floor. What is stated in the consent terms Ex.33 is that because the defendants got F.S.I. they can put up construction is false because one would not be entitled for whole. If F.S.I. would be available to all the 12 members in equal shares, it can never be pleaded by the defendants No.1 & 2 that they got the entire F.S.I. when the construction is of only 80 sq.yds. of each flat. Therefore, the defendants No.1 & 2 can not construct 2 flats on the terrace of the 2nd floor.

vi) If at all there was genuine compromise between the parties then there was no need for defendants No.1 & 2 to give such undertaking Ex.31 before the trial Court that without affecting the terrace right of the plaintiff they will put up construction.

vii) One more additional fact which is required to be stated is that while making the Rule absolute on Civil Application No.9723 of 2000 filed in this Appeal, my learned Brother (M.H.Kadri, J.) rejected specific request made by Shri S.M.Shah for the respondents - defendants No.1 & 2 for allowing them to complete the construction work for their terrace portion which was held up because of the ad.interim relief granted by this Court, as His Lordship was of the view that the respondents - defendants No.1 & 2 had committed clear breach of injunction of this Court. It may be stated that separate Application was filed under Order : 39 Rule :2(A) C.P.C. for breach of injunction.

10. From the above, it clearly appears that the compromise was fraudulent one. Unfortunately it seems that only with a view to get one more disposal the learned trial Judge, without applying her mind, straightway decreed the Suit on the basis of consent term Ex.31 and the Undertaking Ex.33. Once this Court satisfied that the decree passed by the trial Court is fraudulent one then the same is required to be quashed

and set aside. It may be stated that under Order : 23, Rule : 3 C.P.C. compromise is required to be duly signed by the parties which was not done in this case. On this ground also the impugned decree was required to be quashed and set aside.

11. In view of above discussion, this Appeal is allowed. The impugned consent decree dated 7.8.2000 passed by the trial Court in Regular Civil Suit No.2689 of 1994 is hereby quashed and set aside. The main Regular Civil Suit No.2689 of 1994 is now restored to the file of learned City Civil Judge, City Civil Court, Ahmedabad, and the learned trial Judge is directed to proceed further with the Suit from the date on which it disposed of the same on the basis of the consent term. The learned Judge shall decide the Suit in accordance with law. Interim relief granted earlier to continue till the final disposal of the Suit. There shall be no order as to costs.

In view of the fact that this Appeal is allowed, learned Counsel Shri Patel submitted that Civil Application No.8362 of 2000 filed by them under Order : 39, Rule 2(A) C.P.C. be also disposed of and accordingly the same is disposed of.

sd/-

Date : November 01, 2001 (B.J.Shethna, J.)

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